SUPREME COURT NO. 85382-7
Court of Appeals No. 40909-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

DOUGLAS FELLOWS as Personal Representative
of the Estate of JORDAN GALLINAT,

Petitioner,

v.

DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.
AND SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

RESPONDENT SOUTHWEST WASHINGTON MEDICAL CENTER'S ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Southwest Washington Medical Center ("SWMC"), defendant in the underlying superior court proceeding, opposes the motion of petitioner Doug Fellows, personal representative of the Estate of Jordan Gallinat ("Gallinat") for discretionary review, which is erroneously styled as a petition for review.

II. DECISION BELOW

Although captioned as a petition for review and argued according to the factors set forth in RAP 13.4, Gallinat's motion is one of discretionary review under RAP 13.5. Gallinat requests the Supreme Court accept discretionary review of the November 9, 2001, order by Division II of the Court of Appeals, *App. 217*, which denied Gallinat's motion to modify the Commissioner's August 30, 2010 ruling denying Gallinat's motion for discretionary review, *App. 120-28*, of various orders entered by Judge Robert A. Lewis of the Clark County Superior Court, *App. 1-12*.

III. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Should the Supreme Court deny discretionary review where Gallinat has not and cannot meet the RAP 13.5(b) criteria?

IV. RESTATEMENT OF THE CASE

Respondent SWMC hereby joins and incorporates by reference the Counterstatement of the Case outlined in Respondent Dr. Moynihan's Answer to Plaintiff's Motion for Discretionary Review.

A. Parties

Petitioner is Doug Fellows, the appointed conservator for Jordan Gallinat, a minor child. Respondent SWMC is a regional medical center that provides health care services to patients residing in the Vancouver, Washington area. As required by Washington law of all hospitals, SWMC has an organized medical staff and a process by which it admits physicians to its medical staff and confers on them privileges to perform certain services for their hospitalized patients.

B. Procedural History

Gallinat's motion for discretionary review, erroneously styled as a Petition for Review, is his sixth attempt to convince a court that he should obtain access to SWMC's quality improvement and peer review files with regard to its physician co-defendants, despite the privilege conferred by RCW 4.24.250[1] and RCW 70.41.200(3)[2] which shields these materials

[1] RCW 4.24.250(1) refers to (but does not require a hospital to have) a "regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession." The statute further provides that "[t]he proceedings, reports and written records of such

from review in a civil case such as this one, in which Gallinat alleges medical negligence. The trial court denied Gallinat's motion to compel these materials, *App. 1-2*, denied Gallinat's motion for reconsideration, *App. 3-4*, and denied Gallinat's belated motion for *in camera* review of the privileged files, *App. 5-6*. The Commissioner ruled that the three trial court orders did not merit discretionary review because the rulings did not render further proceedings "useless" per RAP 2.3(b)(1), and because they did not substantially alter the status quo per RAP 2.3(b)(2), *Supp. App. 120-28*. The Court of Appeals thereafter denied Gallinat's motion to modify the Commissioner's ruling denying discretionary review, *2d. Supp. App. 217*. Gallinat's motion to this Court followed on December 8, 2010.

V. ARGUMENT

Respondent SWMC hereby joins and incorporates by reference the Argument and Authorities outlined in Respondent Dr. Moynihan's Answer to Plaintiff's Motion for Discretionary Review.

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committees or boards . . . are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action . . . ." RCW 4.24.250 was enacted in 1971.

[2] RCW 70.41.200(1) was enacted in 1986 and requires every hospital to have a quality improvement program. Subsection (3) provides in pertinent part that "[i]nformation and documents , including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action . . . ." None of the exceptions contemplated apply to this case.

A. Gallinat Has Not Demonstrated the Criteria for Accepting Review.

The Supreme Court should not accept review of the Court of Appeals' Order because Gallinat has failed to demonstrate that the relevant criteria for acceptance of review have been met. Under RAP 13.5(b),

> Discretionary review of an interlocutory decision of the Court of Appeals will be accepted ***only***:
>
> (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or
>
> (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court. [Emphasis supplied.]

Gallinat's failure to address or argue these considerations is grounds alone for denying discretionary review.

B. Gallinat Has Not and Cannot Demonstrate the Criteria Meriting Discretionary Review Under RAP 13.5(b).

A motion for discretionary review under RAP 13.5(b)(1) requires not just a showing of obvious error, but that "which would render further proceedings useless". Likewise, RAP 13.5(b)(2) allows for discretionary

review only where there has been a probable error that "substantially alters the status quo or substantially limits the freedom of a party to act."

As a primary matter, Gallinat has not shown and cannot show that the denial of his motion to modify the Commissioner's ruling was either an "obvious error" or a "probable error". As discussed below, lower courts' rulings do not conflict with any of the four cases cited by Gallinat, and therefore the first prongs of RAP 13.5(b)(1) and (2) are not satisfied.

In addition, Gallinat has not shown and cannot show that the denial of his motion to modify the Commissioner's ruling "renders further proceedings useless", per RAP 13.5(b)(1). Gallinat has brought causes of action beyond that of corporate negligence against the various defendants, and he may still pursue those claims. Gallinat also has not shown and cannot show that the ruling was probable error, much less that it substantially alters the *status quo* or limits his freedom to act, within the meaning of RAP 13.5(b)(2). *E.g.*, Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-46 (1986) (with regard to the parallel RAP 2.3(b)(2)[3], suggesting that a ruling "would not qualify for

[3] The considerations set forth in RAP 13.5(b) track the provisions of RAP 2.3 (relating to discretionary review of trial court decisions), taking into account the courts involved. *Compare* RAP 13.5(b)(1) *with* RAP 2.3(b)(1) *with* RAP 13.5(b)(2) *with* RAP 2.3(b)(2),

review . . . if it merely altered the status of the litigation itself or limited the freedom of a party to act in the conduct of the lawsuit"). Gallinat may still conduct non-privileged discovery, retain expert witnesses, and pursue this case to and through trial if he desires.

Assuming *arguendo* that Gallinat's motion, by arguing that the lower courts' rulings conflict with case law, should be considered as advocating for discretionary review under RAP 13.5(b)(3), Gallinat still has not shown and cannot show that the Court of Appeals ruling so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the trial court, as to call for the exercise of revisory jurisdiction by this Court. The Court of Appeals' declination to modify the Commissioner's ruling does not conflict with *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997), *Coburn v. Seda*, 101 Wn.2d 270, 677 P.2d 173 (1984), *Anderson v. Breda*, 103 Wn.2d 901, 700 P.2d 373 (1985), or *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009).

Gallinat asserts that under *Burnet*, "a hospital's credentialing and privileging records for a treating physician are relevant on a negligent credentialing claim", *Petition at p. 10*, and it is therefore an abuse of

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and RAP 13.5(b)(3) *with* RAP 2.3(b)(3). *See also*, Karl B. Tegland, 3 *Wash. Practice: Rules Practice*, RAP 13.5, cmt., ¶ 3 (6th ed. 2004).

discretion to deny discovery of such materials. But as the Commissioner recognized, *Supp. App. 127*, the *Burnet* opinion "addressed limitations on discovery of credentialing records imposed as a sanction for violation of a discovery order, not imposed by RCW 70.41.200(3) or other similar privileging statutes." *Id.* And, the statutory privileges conferred upon SWMC's quality assurance and peer review materials remain intact despite any potential relevancy alleged by Gallinat; relevancy does not trump a privilege. *E.g.*, CR 26(b)(1).

Gallinat also argues that the Court of Appeals' denial of his motion to modify is in conflict with *Anderson* and *Coburn*, which he posits stand for the proposition that a quality assurance privilege only applies to retrospective review of a medical incident. *Petition at p. 10.* This interpretation distorts the holdings in *Anderson* and *Coburn*, and ignores the plain language of RCW 70.41.200(1)(a) (as enacted after those decisions), which states that quality improvement committees must review services both retrospectively and prospectively. Furthermore, RCW 70.41.230, which requires hospitals to request information from a physician prospectively, before granting or renewing privileges, also allows that "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by

a quality improvement committee are not subject to discovery or introduction into evidence in any civil action . . . ." RCW 70.41.230(5).

Finally, Gallinat takes the Court's ruling in *Putman* out of context. *Putman* did not address issues related to quality assurance or the statutory quality assurance privilege. Instead, its holding addressed access to courts at the inception of a lawsuit, striking down a certificate of merit statute, RCW 7.70.150, as impermissibly denying medical malpractice plaintiffs the opportunity to engage in "discovery authorized by the rules." *Putman*, 166 Wn.2d at 979. But even discovery authorized by the rules, and specifically CR 26(b)(1), is limited to "any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action . . . [emphasis added]", and subject to the trial court's discretionary ability to limit it under CR 26(c).

There cannot therefore be a genuine argument that the Court of Appeals' denial of Gallinat's motion to modify qualifies as a departure from the "expected and usual course of judicial proceedings" under RAP 13.5(b)(3).

VI. CONCLUSION

Gallinat failed to set forth the pertinent considerations governing acceptance of review, as required by RAP 13.5(b), and for this reason alone his motion for discretionary review should be denied. Even if this

failure is not fatal to his motion, Gallinat has not and cannot demonstrate that any of the considerations of RAP 13.5(b) have been met. SWMC respectfully requests that this Court deny discretionary review and allow the decisions of the underlying courts to stand.

Respectfully submitted this 10th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **RESPONDENT SOUTHWEST WASHINGTON MEDICAL CENTER'S ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW** to be delivered as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 10th day of January, 2011.

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